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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 * * *

6 T1 Payments LLC,

7 Plaintiff,

8 v.

9 New U Life Corporation,

10 Defendant.
11

Case No. 2:19-cv-01816-APG-DJA

**ORDER AND
REPORT AND RECOMMENDATION**

12 This matter is before the Court on the following motions:

- 13 • Defendant's Motion to File First Amended Counterclaim (ECF No. 42), filed on
14 October 1, 2020, Declaration (ECF No. 43), filed on October 1, 2020, Proposed
15 Counterclaim (ECF No. 44), filed on October 1, 2020, Response (ECF No. 53),
16 filed on October 15, 2020, and Reply (ECF No. 58), filed on October 22, 2020.
- 17 • Plaintiff's Motion to Vacate Order ECF No. 39 (ECF No. 47), filed on October 2,
18 2020, Response (ECF No. 55), filed on October 16, 2020, and Reply (ECF No.
19 56), filed on October 19, 2020.
- 20 • Plaintiff's Motion to Compel Discovery (ECF No. 49), filed on October 5, 2020,
21 Response (ECF No. 57), filed on October 19, 2020, Errata to Response (ECF No.
22 70), filed on October 27, 2020, and Reply (ECF No. 61), filed on October 26,
23 2020.
- 24 • Defendant's Motion to Extend (ECF No. 50), filed on October 9, 2020, and
25 Response (ECF No. 60), filed on October 23, 2020.
- 26 • Plaintiff's Motion for Protective Order (ECF No. 62), filed on October 26, 2020,
27 Response (ECF No. 74), filed on November 9, 2020, and Reply (ECF No. 77),
28 filed on November 16, 2020.

- 1 • Plaintiff’s Motion to Disqualify Counsel (ECF No. 64), filed on October 26, 2020,
- 2 Appendix Volumes 1-5 (ECF Nos. 65-69), filed on October 26, 2020, Response
- 3 (ECF No. 73), filed on November 9, 2020, Joinder (ECF No. 75), filed on
- 4 November 9, 2020, Errata to Response (ECF No. 81), filed on November 20, 2020,
- 5 Reply (ECF No. 79), filed on November 16, 2020, and Objection (ECF No. 80),
- 6 filed on November 17, 2020.
- 7 • Defendant’s Motion to Compel (ECF No. 72), filed on October 30, 2020,
- 8 Response (ECF No. 76), filed on November 13, 2020, and Reply (ECF No. 82),
- 9 filed on November 20, 2020.
- 10 • Plaintiff’s Motion for Leave to File Excess Pages (ECF No. 78), filed on
- 11 November 16, 2020, Response (ECF No. 80), filed on November 17, 2020, and
- 12 Reply (ECF No. 83), filed on November 24, 2020.

13 The Court finds these matters properly resolved without a hearing. LR 78-1.

14 **I. BACKGROUND**

15 The parties are familiar with the facts of this case and the Court will only repeat them here
 16 as necessary. New U Life sells various health supplements through a multilevel marketing model
 17 (“MLM”). While MLM and nutraceutical businesses like New U Life’s are legal, they are
 18 classified as “high risk” by payment processors because they tend to be more prone to
 19 chargebacks and face a high level of regulatory scrutiny. On or about October 26, 2018, New U
 20 Life executed a Merchant Services Application and Card Payment Processing Agreement
 21 (collectively, the “CPPA”) with T1 Payments to open a merchant account on behalf of New U
 22 Life for the purpose of processing credit card transactions. The parties dispute who ended the
 23 contract and who is entitled to the funds held by T1.

24 The parties raise 8 discovery disputes for the Court to decide. Given the extensive
 25 number of motions at issue, the Court will address the arguments by the parties separately in
 26 discussing each motion below.

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II. DISCUSSION

a. New U's Counterclaim (ECF No. 42)

New U seeks to file a First Amended Counterclaim to add 11 claims for: Fraud, conversion, civil theft, money had and received, unjust enrichment, civil RICO claims based on Nevada and federal law, breach of contract, breach of covenant of good faith and fair dealing, and declaratory relief. (ECF No. 42). It claims that it recently discovered new facts in September 2020, when it retained a new law firm that has expertise in payment processing matters and T1 concealed this information. New U argues that there is good cause to allow the amendment and T1 will not suffer prejudice as fact discovery has not closed and a trial date has not been set.

T1 responds that New U did not present good cause or excusable neglect for the late amendment request simply because its prior attorneys were not experienced enough to recognize the applicable counterclaims. (ECF No. 53). It also questions whether the counterclaims are futile and therefore, amendment should not be permitted. Further, T1 argues that it would incur unfair prejudice based on additional expense to conduct discovery.

New U replies that it diligently pursued discovery to learn of the information that forms the basis for the proposed counterclaims. (ECF No. 58). It also contends that the amendment is not futile as each counterclaim is supported by factual information and sufficiently pled. New U also argues that there is no undue prejudice as there have been several extensions to the discovery period due to COVID-19 concerns and conducting additional discovery on these counterclaims is not sufficient to preclude amendment.

The Court agrees with New U's position and is satisfied that it has met the appropriate standard for amendment. Rule 15(a)(2) of the Federal Rules of Civil Procedure, regarding the amendment of pleadings, directs that "[t]he court should freely give leave when justice so requires." The Ninth Circuit Court of Appeals has repeatedly cautioned courts in this circuit to "liberally allow a party to amend its pleading." *Sonoma Cnty. Ass'n of Ret. Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013). "Courts may decline to grant leave to amend only if there is strong evidence of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the

opposing party by virtue of allowance of the amendment, or futility of amendment, etc.” *Id.* at 1117 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

When leave to amend is sought after the amendment deadline in the court’s scheduling order has expired, the movant must also show good cause to reopen the amendment period and excusable neglect for the delay. *See* Fed. R. Civ. P. 6(b)(1)(B) (stating “the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect.”); *see also* Fed. R. Civ. P. 16(b)(4). In evaluating excusable neglect, the court weighs: “(1) the danger of prejudice to the non-moving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party’s conduct was in good faith.” *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004) (citing *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993)). The weight assigned to these factors is left to the court’s discretion. *Id.* When a court can “conceive of facts that would render plaintiff’s claim viable,” or “it appears at all possible that the plaintiff can correct the defect,” an amendment should not be found futile. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir. 1988) (internal quotation marks and citations omitted).

As New U filed its Motion to Amend after the expiration of the deadline to amend the pleadings, March 20, 2020, it falls under Rule 16. (ECF No. 14).¹ The Court finds that New U should be permitted to amend to assert counterclaims as requested because they have satisfied the good cause and excusable neglect standards. Amendment at this stage would be neither extraordinarily disruptive nor prejudicial to T1. Indeed, T1 is clearly aware of the proposed counterclaims and the amendment merely clarifies the scope of this case. The parties have not yet filed dispositive motions, the settlement conference has not yet been conducted, and there is no trial set.

¹ The extension of discovery deadlines in Order ECF No. 24 and subsequently, Order ECF No. 39 did not include extending the deadline to amend the pleadings and add parties.

Further, the passage of time is not reason enough to preclude amendment. *See, e.g., Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981) (“Ordinarily, leave to amend pleadings should be granted regardless of the length of time of delay by the moving party absent a showing of bad faith by the moving party or prejudice to the opposing party.”). Also, T1 has not shown that New U’s proposed amendment concerning counterclaims is futile. Rather, T1’s arguments appear to be centered on the fact that discovery will be needed on the counterclaims and it wants to avoid such discovery. Therefore, the Court will grant the Motion as New U has provided sufficient good cause and excusable neglect to amend and assert the proposed counterclaims (ECF No. 42).

b. T1’s Motion to Vacate (ECF No. 47)

T1 seeks to vacate the scheduling order (ECF No. 39) and reinstate the previous – now expired deadlines – because it was “defrauded” into agreeing to extend discovery deadlines prior to knowing New U would seek to file counterclaims. (ECF No. 47). It contends that New U attorneys violated ethical rules and the duty of candor to the Court, which warrants granting T1 attorneys fees for having to bring this request. In response, New U denies all attempts to commit any fraud and asserts that T1’s Motion is brought in bad faith as it is retaliatory. (ECF No. 55). T1 replies that New U is again misrepresenting and omitting material information to justify its actions. (ECF No. 56).

A district court “possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient[,]” so long as it has jurisdiction. *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (quotation and emphasis omitted); *see also Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013). This district’s local rule LR 59-1 advises that “[a] party seeking reconsideration . . . must state with particularity the points of law or fact that the court has overlooked or misunderstood.” LR 59-1(a). “Motions for reconsideration are disfavored. A movant must not repeat arguments already presented” except in narrow circumstances. *Id.* at (b).

T1 does not set forth a valid reason why the Court should reconsider Order ECF No. 39. Rather, its motion to vacate is inflammatory, punitive, and indicative of the deterioration in

1 relationship with opposing counsel. The clear purpose of the Motion is to prevent New U from
2 doing any discovery on its counterclaims. Indeed, reversing a discovery extension would
3 effectively end discovery at a premature stage of this litigation given the Court's decision to
4 permit the counterclaims. Resolution of this action on the merits would not be promoted by
5 granting T1's request. Despite the strong rhetoric in T1's Motion, the Court is not persuaded that
6 the goals of Fed.R.Civ.P. 1 would be furthered by such a vindictive action. The Court's position
7 should not be misinterpreted to mean it is opening up a brand new discovery period and free rein
8 has been granted to New U to conduct a massive amount of new discovery. Rather, the Court
9 expects New U and T1 to act diligently to complete discovery in a timely fashion especially given
10 the prior discovery extensions permitted in this action. The Court will deny T1's Motion to
11 Vacate (ECF No. 47).

12 **c. T1's Motion to Compel (ECF No. 49)**

13 T1 makes three requests as part of its Motion to Compel: (1) New U supplement its
14 response to interrogatory no. 24; (2) New U produce all non-privileged documents responsive to
15 request for documents nos. 1-3, 9-10, 12, 17-18, 24-25, 27, 31, 42-43, 49, 56, 61, 62, 68-69; (3)
16 New U supplement its response to request for documents nos. 72-73 that correctly identify the
17 documents produced that are responsive to the corresponding requests. T1 also claims that New
18 U's objections to all but two of the document requests are untimely as the requests were served on
19 February 12, 2020 and the deadline to respond was March 13, 2020, which T1 agreed to extend
20 until March 27, 2020. New U's responses were served on April 29, 2020 and its documents were
21 produced on May 2, 2020. As such, T1 contends that New U's objections should be waived or
22 are improper.

23 New U responds that T1's extensive discovery requests are not relevant to the claims or
24 defenses at issue in this case. (ECF No. 57). It argues that T1 must not be allowed to both claim
25 that the contract was terminated due to New U's violation while also requesting extensive
26 discovery into New U's business to support that claim. New U admits that counsel simply
27 assumed it would be granted a lengthier extension due to the COVID-19 conditions and the
28 Nevada Governor's directives tolling time limits for legal proceedings.

1 T1 replies with a table highlighting misstatements it believes New U has made to the
2 Court regarding the discovery at issue. (ECF No. 61). It renews its argument that the objections
3 should be deemed waived and expands on the relevance support for the discovery requests.

4 Fed.R.Civ.P. 33 requires the responding party to serve its answers or any objections
5 within 30 days after being served with written interrogatories. Fed.R.Civ.P. 34 requires a party
6 upon whom document requests are served to respond in writing within 30 days after being served
7 with the requests. The “failure to object to discovery requests within the time required constitutes
8 a waiver of any objection.” *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473
9 (9th Cir. 1992); *see also Haddad v. Interstate Management Co., LLC*, 2012 WL 398764, * 1 (D.
10 Nev. 2012) (same).

11 Further, Fed.R.Civ.P. 26(b)(1) provides for broad and liberal discovery. “Parties may
12 obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or
13 defense.” *Id.* However, a court may limit discovery via Rule 26(c), which permits the court to
14 issue a protective order to protect a party or person from annoyance, embarrassment, oppression,
15 or undue burden or expense when the party establishes good cause. For good cause to exist, the
16 party seeking protection bears the burden of showing specific prejudice or harm will result if no
17 protective order is granted. *See Beckman Indus., Inc., v. Int’l. Ins. Co.*, 966 F.2d 470, 476 (9th
18 Cir. 1992). Rule 26(c) requires more than “broad allegations of harm, unsubstantiated by specific
19 examples or articulated reasoning.” *Id.*; *see also Foltz v. State Farm*, 331 F.3d 1122, 1130 (9th
20 Cir. 2003) (*citing San Jose Mercury News, Inc., v. District Court*, 187 F.3d 1096, 1102 (9th Cir.
21 1999) (holding that the party must make a particularized showing of good cause)).

22 The Supreme Court has interpreted the language of Rule 26(c) as conferring “broad
23 discretion on the trial court to decide when a protective order is appropriate and what degree of
24 protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Additionally, the
25 Supreme Court has acknowledged that the “trial court is in the best position to weigh fairly the
26 competing needs and interests of the parties affected by discovery. The unique character of the
27 discovery process requires that the trial court have substantial latitude to fashion protective
28 orders.” *Id.*

1 Here, the Court examined whether the information sought by all of the challenged
2 interrogatories and requests for production was relevant to a party's claim or defense and
3 proportional to the needs of the case. It finds that T1 has carried its burden of demonstrating
4 relevance as the three main issues that the written discovery target – alleged international/cross
5 border fees, responsibility for contract termination, and contract compliance/unclean hands –
6 relate directly to the claims and defenses of the parties.

7 For the proportionality analysis, the Court considered the importance of the issues at
8 stake, the amount in controversy, the parties' relative access to information, the parties' resources,
9 the importance of the discovery in resolving the issues, and whether the burden or expense of the
10 proposed discovery outweighs its likely benefit. Fed.R.Civ.P. 26(b)(1); *see also Caballero v.*
11 *Bodega Latina Corp.*, 2017 WL 3174931 at *2 (D. Nev. July 25, 2017). Ultimately, the Court
12 finds supplementation by New U is necessary, but will uphold some of New U's objections to the
13 requests for production as some of the requests are not proportional to the needs of the case.

14 The Court will not deem New U's objections to be waived. It understands that counsel for
15 New U was under the impression that Nevada Governor's Directive tolled the deadline to respond
16 and thus, New U believes its responses to be timely. Further, the Court is aware of the conditions
17 that the COVID-19 pandemic has put on counsel to operate during a global pandemic. While
18 New U's counsel should have communicated more clearly with T1's counsel on the time to
19 respond, the Court finds that waiving the objections is not appropriate in these particular
20 circumstances. Indeed, discovery has not been impeded by a few weeks delay in serving
21 responses; no depositions were claimed to have been rescheduled. This breakdown in
22 communication between counsel, while not surprising given the history of this case thus far, is not
23 enough to warrant waiving substantive objections.

24 However, New U is under the mistaken assumption that simply asserting objections –
25 even boilerplate ones - means that it does not need to provide substantive responses. The Court
26 understands that New U has concerns about the time frame requested by T1 in interrogatory no.
27 24. However, simply because the termination occurred in November 2018 and the interrogatory
28 requests investigation information through 2020, does not mean that the request is irrelevant. The

1 Court also understands that New U denied a response because it believes the interrogatory
2 contains three subparts. However, who, what, and when inquiries into the investigation are
3 sufficiently subsumed to permit the interrogatory to stand. There is no greater burden on New U
4 to identify who and when. Indeed, if the Court were to limit this interrogatory to only what was
5 the investigation and deny the who and when parts, then T1 would be left to ask the who and
6 when parts during a deposition. This seems to make discovery unnecessarily slower, which does
7 not promote the spirit and intent of Rule 1. As such, the Court will require New U to supplement
8 its response to interrogatory no. 24.

9 As for documents requests nos. 1-3, 9-10, 12, 17-18, 24-25, 27, 31, 42-43, 49, 56, 61-62,
10 68-69, New U represents that it has produced all responsive documents. The Court cannot
11 compel something that does not exist. To the extent that T1 learns of any specific documents it
12 believes that New U has not produced that are responsive to these requests, then it may pursue the
13 appropriate request for relief at that time, including sanctions.

14 Additionally, the Court finds that New U's proportionality challenge to requests nos. 12,
15 40, 42-43, 49, 56, and 61-62 to be valid for the most part. The requests encompass a broad range
16 of information, such as all customer notes, all checkout pages, all advertising materials, all
17 contracts, all studies concerning any New U Life product or any ingredient, which the Court
18 simply cannot justify as proportional to the needs of this case at the present time. T1 may move
19 forward to explore such topics in general during depositions, but should be extremely mindful to
20 try harder to tailor them to this specific case. For example, the Court will accept T1's proposed
21 tailoring of document request no. 12 to be only checkout pages used to sell the products sold
22 using T1 payments merchant account provided to New U Life with the definition provided by T1
23 in the August 18, 2020 letter. New U shall provide a supplement to request no. 12 as narrowed.
24 T1 may also move forward to obtain information that is accessible from third parties or
25 advertising and other information readily accessible on the internet.

26 The trade secret and confidential business information objection raised by New U was too
27 vague for the Court to consider at this point. New U should be mindful that it should engage with
28 T1 to put a protective order in place to govern the exchange of discovery documents. The Court

1 will not uphold New U's decision to withhold documents simply on that vague objection alone.
2 As it was unable to determine if there were any specific documents upheld solely on the trade
3 secrets/confidentiality objection, it is unable to compel any specific documents. Therefore, the
4 Court will only compel a limited supplement to New U's responses.

5 Finally, the Court will also require New U to clarify the documents cited in its response to
6 request for documents nos. 72-73. T1 claims that New U cited hundreds of pages that had
7 nothing to do with the requests. It is entitled to explore this in a deposition, but to request some
8 sort of interrogatory explanation of how the documents counsel identified relate to the requests is
9 not appropriate. As a result, the Court will deny this portion of the Motion to Compel.

10 The Court feels compelled to remind the parties discovery gamesmanship in which one
11 party attempts to hide-the-ball in contravention of the Federal Rules of Civil Procedure will not
12 be tolerated in this Court. The Court is well aware that the legal practice may pressure counsel to
13 take untenable positions due to unreasonable client views. Nevertheless, compromising one's
14 reputation before the Court over written discovery is unwise. Counsel should make every effort
15 to practice civility and avoid wasting valuable court resources on discovery disputes that should
16 have been resolved via a good faith meet and confer. Ultimately, the Motion is granted in part
17 and denied in part as outlined above.

18 **d. New U's Motion to Extend (ECF No. 50)**

19 New U seeks an extension to the outstanding discovery deadlines in order to complete
20 discovery on the additional claims for relief and defendants in the counterclaim. (ECF No. 50).
21 It intends to serve additional written discovery, retain an expert, and complete depositions. New
22 U contends that it has acted diligently in pursuing discovery so far given the discovery disputes
23 the parties have encountered and no prejudice will result to T1.

24 T1 responds that it is concerned about a conflict of interest, which is separately briefed,
25 and granting an extension on a counterclaim that has not been accepted is premature. (ECF No.
26 60).

27 The Court finds that New U has stated good cause to extend the outstanding discovery
28 deadlines. T1 is undoubtably aware of the lenient good cause standard in which discovery

1 extensions are subject to here. Further, the Court finds it appropriate to extend the current
 2 schedule given that it is permitting the counterclaims to proceed. As such, it will grant the
 3 Motion and discovery shall be conducted as follows:

- 4 • Discovery cutoff: May 28, 2021
- 5 • Initial expert disclosures: June 28, 2021
- 6 • Rebuttal expert disclosures: July 28, 2021
- 7 • Dispositive motions: July 19, 2021
- 8 • Joint pretrial order: August 19, 2021

9 **e. T1's Motion for Protective Order (ECF No. 62)**

10 TI seeks a protective order with respect to three Rule 45 subpoenas that New U served on
 11 third parties – MasterCard, Visa, and Priority Payment Systems. (ECF No. 62). It argues there
 12 are three reasons to enter a protective order precluding the discovery sought by the subpoenas: (1)
 13 The subpoena requests are not relevant to any claim or defense in this case as information about
 14 thousands of merchants and their transactions have nothing to do with this litigation; (2) The
 15 subpoena requests are not proportional to the needs of this case as they seek millions of records
 16 containing confidential and proprietary information about T1's customers when discovery is
 17 nearing a close; (3) The subpoena requests target trade secret and confidential business
 18 information of T1, which it depends on to maintain a competitive edge. From Mastercard, T1
 19 claims that New U seeks all documents related to communications between it and any customer
 20 of T1. From Visa, T1 claims that New U does not set forth a time frame for the documents and
 21 also seeks all customer communications. From Priority Payment, T1 claims that New U likewise
 22 does not provide a temporal limit and requests all originating bank account documents from
 23 which it ever received funds for T1.

24 New U responds that it seeks documents that would confirm that T1 is a fake payment
 25 facilitator that was operating without a proper registration, which relates to the issue of whether
 26 the parties contract was void as an illegal contract. It also counters T1's arguments as follows:
 27 (1) The requests are relevant to New U's defense to the original contract claims as they seek
 28 registration records; (2) The requests seek customers that are limited to member financial

1 institutions of Visa and Mastercard, not the 8,000 customers of T1; (3) New U offered to enter
2 into a stipulated protective order like the model one for the Northern District of California. New
3 U believes that T1 illegally aggregates merchant transactions, a form of credit laundering and
4 rather than opening a merchant account in New U's name, T1 processed the transactions under an
5 account held in T1's own name.

6 T1 replies that this case involves discrete issues and New U has failed to tie the subpoenas
7 to any claim or defense. (ECF No. 77). It contends that the subpoenas are targeted to the
8 proposed counterclaims, which was not permitted at the time T1 filed its Reply. Further, T1
9 argues that the Priority Payment Systems subpoena is only intended to seek confidential and
10 proprietary information about T1's internal operations. As to the Visa and Mastercard subpoenas,
11 T1 reiterates its objection to the time frame sought – back to 2016 – when it claims this case
12 concerns a 3 week contractual payment processing relationship in 2018. T1 contends that in
13 addition to the documents not being relevant, they are also overly burdensome for T1 because it
14 would require T1's attorneys to engage in document review costs that would exceed the value of
15 the case.

16 Federal Rule of Civil Procedure 26(b)(1) provides for broad and liberal discovery.
17 “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s
18 claim or defense and proportional to the needs of the case.” *Id.* The court may limit discovery if
19 it is unreasonably cumulative or duplicative, or can be obtained from some other source that is
20 more convenient, less burdensome, or less expensive . . . [or] the proposed discovery is outside
21 the scope permitted by Rule 26(b)(1). Rule 26(b)(2)(C)(i-iii). Further, a court may limit
22 discovery via Rule 26(c), which permits the court to issue a protective order to protect a party or
23 person from annoyance, embarrassment, oppression, or undue burden or expense when the party
24 establishes good cause. When the discovery at issue is a subpoena on a nonparty, Rule 45
25 governs. “It is well established that the scope of discovery under a subpoena issued pursuant to
26 Rule 45 is the same as the scope of discovery allowed under Rule 26(b)(1).” *Painters Joint*
27 *Committee v. Employee Painters Trust Health & Welfare Fund*, 2011 WL 4573349 at *5 (D. Nev.
28 Sept. 29, 2011).

1 “[A] party lacks standing under Fed. R. Civ. P. 45[(d)(3)(A)] to challenge a subpoena
2 issued to a non-party unless the party claims a personal right or privilege with respect to the
3 documents requested in the subpoena.” *G.K. Las Vegas Ltd. Partnership v. Simon Property*
4 *Group, Inc.*, 2007 WL 119148 at* 4 (D. Nev. Jan. 9, 2007); *compare In re Rhodes Companies,*
5 *LLC*, 475 B.R. 733, 740 (D. Nev. Apr. 30, 2012) (declining to adopt the “personal right or
6 privilege” standing rule for motion to quash subpoenas). “A party’s objection that the subpoena
7 issued to the non-party seeks irrelevant information or imposes an undue burden on the non-party
8 are not grounds on which a party has standing to move to quash a subpoena issued to a non-party,
9 especially where the non-party, itself, has not objected.” *G.K. Las Vegas Ltd. Partnership*, 2007
10 WL 119148 at* 4. “A party can, however, move for a protective order in regard to a subpoena
11 issued to a non-party if it believes its own interest is jeopardized by discovery sought from a third
12 party and has standing under Rule 26(c) to seek a protective order regarding subpoenas issued to
13 non-parties which seek irrelevant information.” Fed.R.Civ.P. 26(c)(1); *see also First Am. Title*
14 *Ins. Co. v. Commerce Assocs., LLC*, 2017 WL 53704, at *1 (D. Nev. Jan. 3, 2017).

15 First, the Court finds that T1 has standing to challenge the subpoenas as they concern its
16 registration and financial records. Second, the Court finds that New U’s three Rule 45 subpoenas
17 seek information relevant to New U’s defense that the contract was illegal. When a request is
18 overly broad on its face or when relevancy is not readily apparent . . . the party seeking discovery
19 has the burden to show the relevancy of the request.” *McCall v. State Farm Mut. Auto. Ins. Co.*,
20 2017 WL 3174914, at *6 (D. Nev. July 26, 2017) (internal citations omitted). New U has
21 satisfied this burden in showing how the registration records relate to its argument that T1
22 operated without a proper financial registration. Importantly, the 2015 amendments to Rule 26
23 deleted the phrase “reasonably calculated to lead to the discovery of admissible evidence” and
24 replaced it with language that better represents the phrase’s original intent: “Information within
25 this scope of discovery need not be admissible in evidence to be discoverable.” Rule 26(b)(1).
26 So, admissibility is not an issue here and under the current scope of discovery, the Court is
27 satisfied that the subpoenas are relevant to New U’s defense.
28

1 Third, the three subpoenas are proportional to the needs of this case as T1 has not shown
2 that the third parties would be producing an overly burdensome amount of records; rather, they all
3 appear to be electronic records in a searchable format with Mastercard indicating it is a few
4 screenshots. Further, T1 appears to believe that the proportionality analysis should solely
5 consider how much time its own attorneys would need to spend on reviewing the documents.
6 While it is unclear why its attorneys would need to spend an excessive amount of time reviewing
7 a few screenshots, the Court also notes that none of the third parties have raised any objection that
8 the records would be overly burdensome to produce. That is the focus of the inquiry; how
9 efficient T1's attorneys are at processing this new information is up to T1. Moreover, T1
10 acknowledges that Mastercard intends on responding with its own objections. As Mastercard has
11 not filed any motion before the Court claiming the records are burdensome, it is entitled to
12 respond with its own objections.

13 Fourth, T1 also asserts that it has a privacy interest in these financial/registration records
14 and maintains they are confidential in nature and/or trade secrets. However, while this may
15 weigh towards standing to object to the third-party subpoenas, a privacy or confidentiality
16 objection is easily resolved by the parties submitting a stipulated protective order for the court's
17 approval. New U has represented that it offered to treat these records as confidential and stipulate
18 to a protective order and that T1 has rejected this offer. Therefore, the Court does not find any
19 privacy or confidential concerns warrant quashing the subpoenas at issue. It will deny the Motion
20 for Protective Order (ECF No. 62).

21 **f. T1's Motion to Disqualify Counsel (ECF No. 64)**

22 T1 moves to disqualify New U's counsel – Bradley Cebeci – along with the law firms of
23 Brown Brown & Premsrirut and Rome & Associates, A.P.C. (ECF No. 64). Cebeci previously
24 worked for the Law Offices of Thomas F. Monroe and in fact, represented T1 during that time.
25 T1 claims that as Cebeci is now appearing directly adverse to T1, and T1 claims because he has
26 retained work product he generated for T1, he must be disqualified. Further, T1 argues that the
27 disqualification must be imputed to his law firm and his co-counsel's law firm as Cebeci appears
28 to have shared T1's confidential and privileged information with them.

1 New U responds that this is a tactical maneuver to deprive New U of its chosen counsel,
2 only filed after New U has sought leave to file its counterclaims (ECF No. 73). It contends that
3 Cebeci previously performed discrete assignments for the Monroe Firm in connection with a 2
4 month long representation of T1 back in 2016. It highlights that the representation ended before
5 T1 lost its registration as a payment facilitator in 2017. As such, New U argues that the prior
6 matters were not substantially related and Cebeci has not misused confidential information.
7 Cebeci's co-counsel join in all of the arguments articulated in the Response. (ECF No. 75).

8 T1 replies that New U states erroneous legal standards and the Court should draw an
9 adverse inference against Cebeci based on his refusal to provide a complete copy of his file to T1.
10 (ECF No. 79). It argues that the substantial relationship test has been satisfied and the Court
11 should presume that Cebeci has confidential information related to T1 that is being used to
12 advance New U's claims in this action. T1 believes that Cebeci still possesses documents and
13 information relevant to his prior representation of T1 and his failure to produce them should result
14 in an adverse inference. New U requested to be able to respond to this new adverse inference
15 argument. (ECF No. 80). As addressed below, the Court does not need further argument on this
16 topic as it does not find that the substantial relationship test is satisfied and therefore, does not
17 reach the confidential information step.

18 Whether an attorney should be disqualified is an issue of state law. *In re Cnty. of Los*
19 *Angeles*, 223 F.3d 990, 995 (9th Cir. 2000). The Court looks to the Nevada Rules of Professional
20 Conduct, which provide that: [a] A lawyer who has formerly represented a client in a matter shall
21 not thereafter represent another person in the same or a substantially related matter in which that
22 person's interests are materially adverse to the interests of the former client unless the former
23 client gives informed consent, confirmed in writing. *See* NRPC 1.9. NRPC 1.10(a) states,
24 "While lawyers are associated in a firm, none of them shall knowingly represent a client when
25 any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.9, or 2.2,
26 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present
27 a significant risk of materially limiting the representation of the client by the remaining lawyers in
28 the firm." An exception exists if the lawyer (i) did not have a substantial role in or primary

1 responsibility for the matter that causes the disqualification under Rule 1.9, (ii) is timely screened
2 from any participation in the matter and is apportioned no part of the fee therefrom, and (iii)
3 timely written notice is given to the former client. NRPC 1.10(e). Pursuant to NRPC 1.10(a), “an
4 attorney’s disqualification under RPC 1.9 is imputed to all other attorneys in that disqualified
5 attorney’s law firm.” *New Horizon Kids v. Eighth Jud. Dist. Ct.*, 392 P.3d 166, 169 (Nev. 2017).

6 The burden of proof under Nevada law is that the party seeking disqualification must
7 establish “(1) that it had an attorney-client relationship with the lawyer, (2) that the former matter
8 and the current matter are substantially related, and (3) that the current representation is adverse
9 to the party seeking disqualification.” *Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123
10 Nev. 44, 50 (2007).

11 Further, there is no doubt that having been admitted to practice in this Court on a pro hac
12 vice basis, Cebeci is bound by Nevada law. Indeed, Local Rule IA 11-7 (a) provides that, “[a]n
13 attorney admitted to practice under any of these rules must adhere to the standards of conduct
14 prescribed by the Model Rules of Professional Conduct as adopted and amended from time to
15 time by the Supreme Court of Nevada, except as these standards may be modified by this court.”

16 Additionally, under its inherent power, a court may sanction an attorney or party, “by the
17 control necessarily vested in courts to manage their own affairs so as to achieve the orderly and
18 expeditious disposition of cases.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45, L. Ed. 2d 27
19 (1991). In doing so, the Court is guided by Federal Rule of Civil Procedure 1, which provides
20 that the Rules “should be construed, administered, and employed by the court and the parties to
21 secure the just, speedy, and inexpensive determination of every action and proceeding.” The
22 Court’s inherent power, “also entitles the Court to deny a disqualification motion on condition
23 that the attorney or firm in question comply with certain limitations. This is because a court’s
24 authority to disqualify an attorney or craft appropriate relief to punish or deter attorney
25 misconduct derives from the court’s equitable powers. See Geoffrey C. Hazard, Jr. & W. William
26 Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 4.7,
27 at 4-22 (Aspen, 3d ed. 2007) (“Former clients in particular often pursue motions to disqualify
28 their former counsel from adverse representation. Such motions . . . invoke the equitable powers

1 of the court, and when successful result in an order that is in effect an injunction. Hence . . . a
2 motion for disqualification is governed by such equitable principles as waiver, estoppel, latches,
3 ‘undue hardship’ and ‘a balancing of the equities.’ This helps explain why courts sometimes
4 deny relief on motion for disqualification, even when there is clear proof of violation of a rule of
5 professional conduct.”).

6 Moreover, disqualification motions are “subjected to particularly strict judicial scrutiny.”
7 *Shurance v. Planning Control Int’l, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988) (quoting *Optyl*
8 *Eyewear Fashion Int’l Corp. v. Style Cos.*, 760 F.2d 1045, 1050 (9th Cir. 1985).

9 “Disqualification of counsel is a drastic measure which courts should hesitate to impose except
10 when absolutely necessary.” *FLS Trans. Servs., Inc. v. Casillas*, 2017 WL 6043611, 3 (D. Nev.
11 Dec. 6, 2017). The party seeking disqualification has a “high standard of proof to meet in order
12 to prove that counsel should be disqualified.” *Id.* (internal quotation omitted). Close calls are
13 decided in favor of disqualification. *Brown v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 14 P.3d
14 1266, 1270 (Nev. 2000); (However, “parties should not be allowed to misuse motions for
15 disqualification as instruments of harassment or delay.”). The Court must balance the competing
16 interests of a parties’ right to be represented by counsel of their choice, and the “right to be free
17 from the risk of even inadvertent disclosure of confidential information.” *Id.*

18 The Court applies the above rules of law to the facts of this particular case. As the parties
19 are aware, Judge Ferenbach already address substantially the same motion in the related case – *T1*
20 *Payments, LLC v. Beyond Wealth PTE LLC*, 2:20-cv-1405-JCM-VCF (ECF No. 151). The
21 undersigned agrees with Judge Ferenbach’s analysis and finds the same result is appropriate in
22 this action. T1 has met its burden to show that an attorney-client relationship with Cebeci existed
23 and that the current representation is averse to T1. The litigation matters that Cebeci worked on
24 while employed at the Monroe firm in 2016, however, are not substantially related given that the
25 issues in this case are centered around the termination of the parties’ contract in 2018 and the
26 counterclaims regarding T1’s alleged lack of registration as a payment facilitator. This is not a
27 close case since Cebeci advised T1 on discrete compliance issues and in 2016 T1 allegedly
28 complied with payment processing rules. Indeed, Cebeci lists the discrete assignments he

1 performed over two months in 2016 related to the *Dermactive* action and *Gilling* action. (ECF
2 No. 73, pp. 9-10, Ins. 25-2). Just like not every personal injury action is the same, not every fraud
3 or contract dispute is the same. *See Stevens v. WalMart Stores, Inc.*, 2018 WL 2766876, at *9 (D.
4 Nev. June 8, 2018) (“All personal injury tort claims are not substantially related to all other
5 personal injury tort claims.”). T1 has not sustained its burden to show that the litigation matters
6 that Cebeci worked on for T1 in 2016 are substantially related given the significant changed
7 circumstances in T1’s alleged compliance to a different processing structure with different
8 processing partners.

9 Nevertheless, the Court finds that T1 has shown that Cebeci is attacking his own work
10 product based on the bare allegations in the complaint since Cebeci helped draft the merchant
11 agreement for T1 in 2016. Attorneys are prohibited from attacking their own work product. See
12 Restatement (Third) of the Law Governing Lawyers §132(1) & cmt. d(ii) (2000) (prohibiting
13 attorneys from attacking their own prior work even if no confidential information would be
14 compromised in doing so). The Court thus finds that Cebeci’s actions here are unethical, but the
15 Court retains broad discretion regarding whether to disqualify him or to impose lesser sanctions.
16 “The discretion courts have to determine whether the specific facts of a case warrant a sanction
17 short of disqualification is broad . . . it is not obligated to disqualify that lawyer merely because
18 he has run afoul of the applicable ethical rules. The court is encouraged instead to examine the
19 specific facts and circumstances peculiar to the individual case to decide whether disqualification,
20 or some lesser sanction, would be an appropriate remedy.” *UMG Recordings, Inc. v. MySpace,*
21 *Inc.*, 526 F. Supp. 2d 1046, 1062 (C.D. Cal. 2007) (citing to Richard E. Flamm, Lawyer
22 Disqualification: Conflicts of Interest and Other Bases § 23.1 at 443–45 (Banks and Jordan,
23 2003)).

24 Since the 2016 litigation is not substantially related, T1’s right to be free from the risk of
25 even inadvertent disclosure of confidential information is not strongly implicated here. Applying
26 strict scrutiny, the Court should not deprive New U of counsel with specific knowledge of
27 payment processing law in this case unless it is necessary. Indeed, as Judge Ferenbach points out,
28 T1 never moved for disqualification in the related case: *T1 Payments LLC v. Sarah Grauert et al.*,

1 Case No. 2:20-cv-411-KJD-VCF. Moreover, this Court's ruling is consistent with Judge
 2 Ferenbach's Order in 2:20-cv-1405-JCM-VCF (ECF No. 151). In fact, the issues in that case are
 3 not much different from the issues in this case.

4 As sanctions, the Court recommends admonishing Cebeci and revoking Cebeci's privilege
 5 to practice pro hac vice in this case. The Court also recommends imposing conditions upon Rome
 6 & Associates, the Court should order the firm to: (1) screen Cebeci from this case going forward
 7 to avoid future conflicts or issues from arising in this litigation, and (2) certify that Cebeci has
 8 been screened from this case and that he will not share in any fees going forward by filing a
 9 notice with this Court regarding the screening. The screening should comply with Nevada law.
 10 Screening Cebeci from this case should not be difficult for Rome & Associates since Cebeci lives
 11 in Guatemala and does not share an office with his colleagues. Since the Court finds that
 12 disqualification of Cebeci is not necessary here given that sanctions are available, the Court also
 13 recommends denying T1's request to impute disqualification to Cebeci's law firm Rome &
 14 Associates and co-counsel. Balancing the equities, T1 has not met its heavy burden to disqualify
 15 counsel. Accordingly, the Court recommends that T1's Motion (ECF No. 64) be granted in part
 16 only to the extent that Cebeci should be sanctioned and conditions should be imposed upon Rome
 17 & Associate's representation of New U going forward.

18 **g. New U's Motion to Compel (ECF No. 72)**

19 New U seeks supplemental responses to its written discovery served on April 27, 2020, to
 20 which T1 provided responses on July 2, 2020. (ECF No. 72). It contends that T1 failed to state
 21 whether any responsive documents were withheld, after asserting objections, to RFP Nos. 2-4, 7-
 22 12, 15-17, 32-33, 43-44, 46-56, 68-65, and 68. New U also claims that T1 failed to provide a
 23 privilege log and asserted boilerplate objections. For example, RFP Nos. 1, 6-11, 18, 33, 40, 43,
 24 47-56, 58, 63-65, and 68 all assert the same objection without stating its applicability to the
 25 specific request. New U argues that T1 asserted a relevance objection despite the requests
 26 seeking information on T1's ownership and organization, contracts, services and marketing, prior
 27 complaints, related entities, financial information, regulatory compliance, and proof of service.
 28 Further, New U contends that T1 responded that it would supplement its responses, but nothing

1 has been received to date. New U also seeks to compel supplementary response to a narrow set of
2 interrogatories and admissions and requests its attorney fees.

3 T1 responds that the Motion should be denied because New U failed to meet and confer in
4 good faith prior to filing the Motion, does not include a certificate that complies with the Local
5 Rules, and did not uphold the agreement of counsel to narrow some of the issues. (ECF No. 76).
6 It recites its relevance objection, contends that no privilege log is needed, and seeks attorneys fees
7 for having to respond to this Motion.

8 New U replies that it met and conferred in good faith, the requests are relevant, and T1 is
9 not entitled to attorneys fees. (ECF No. 82).

10 The Court already set forth the applicable legal standards related to a motion to compel
11 above. While the Court is aware that a large number of discovery requests are raised in the
12 Motion, there is still no excuse for New U's failure to provide the specific text of each discovery
13 request and response along with the meet and confer result. Without such information as required
14 by Local Rule 26-6(b-c), the Court is forced to dig through the briefings to decide the dispute.
15 This is exactly why Local Rule 26-6 was written and adopted. As such, the Court agrees with T1
16 that this Motion is procedurally improper. Nevertheless, in an effort to move this case along, the
17 Court will get to the merits of the dispute, but it will not afford this same leniency to any future
18 discovery disputes that fail to comply with the Local Rules.

19 Here, the Court finds that New U has satisfied the relevancy prong as previously defined;
20 indeed, by now, all attorneys should know the proper definition of relevance under the 2015
21 amendments to the Federal Rules of Civil Procedure. The information requested is relevant to the
22 claims and defenses in this part; T1 does not have to like the scope of discovery, especially with
23 the counterclaims now in play, but it cannot simply refuse to respond to requests within that broad
24 scope. To the extent that T1 withheld information solely based on a relevance objection, then it
25 shall supplement its response. The Court denies to compel any further response to any of the
26 RFPs to the extent that T1 raised a separate objection. As previously stated, New U failed to
27 provide the text of the request, the response, and the meet and confer effort for each request and
28

1 thus, the Court will not dig through each objection to determine its validity or invalidity when
2 New U fails to meet its burden.

3 Further, the Court will not require T1 to supplement with a privilege log and identify all
4 withheld documents with respect to each RFP. T1 has represented that it only asserted a privilege
5 objection to RFP No. 14 and after a search, found no responsive documents. So, there is no
6 privilege log to compel. The Court also accepts T1's representation that they never promised any
7 future supplement and notes that T1 is under the affirmative duty to supplement regardless, as set
8 out in Fed.R.Civ.P. 26(e), to extent there are any further documents to be produced in discovery
9 that would need to be admissible for use at trial.

10 The Court will not require T1 to supplement its responses to Rog Nos. 6, 8 and 20. New
11 U can follow up in depositions on the responses regarding marketing clients, the information
12 regarding prior litigation is readily available via a public search and not at all proportional to the
13 needs of this case as it was not limited in time frame or geographically, and third party subpoenas
14 are already served seeking account fund information.

15 For the RFA Nos. 4, 6 and 7, T1 will be provided with one opportunity to substantively
16 respond to these requests. Again, simply dodging responding because T1 believes it is not
17 relevant is not permissible. These are straightforward requests that again fall within the relevant
18 and proportional framework that entitle New U to a direct response. As for New U's request for
19 fees, the Court declines to grant it as the Court only grants in part and denies in part the Motion to
20 Compel (ECF No. 72) as outlined above. Likewise, the Court declines to grant T1's request for
21 attorneys fees.

22 **h. T1's Motion for Leave to File Excess Pages (ECF No. 78)**

23 T1 requests that the Court permit it excess pages to the reply brief submitted in connection
24 with the motion to disqualify counsel (ECF No. 79). (ECF No. 78). It claims that 26 pages is
25 needed for the reply given the volume of material to address and significance of the issues. New
26 U responds that the 12 page limit should still apply because T1 should have submitted their
27 request for excess pages prior to filing the reply brief and the excess pages are double the limit.
28 (ECF No. 80). New U also claims that T1 improperly raised a new argument regarding adverse

1 inferences for the first time in the reply brief and it should be permitted to respond to that new
 2 argument. T1 replies that it is not required to obtain leave in advance of filing the brief, but
 3 rather, before the deadline of the brief expires. (ECF No. 83). It also contends that it did not
 4 know of the adverse inference argument when it filed the motion and a sur-reply is not necessary.

5 The Court largely agrees that requests for excess pages are typically indicative of an
 6 attorneys' inability to edit their writing to a concise argument. However, it declines to cut-off
 7 meritorious arguments in favor of enforcing a procedural safeguard as that would not promote
 8 deciding a matter on the merits. It will permit T1's reply brief and consider all of the arguments
 9 of the parties with respect to the Motion to Disqualify. Therefore, the Court grants T1's Motion
 10 for Excess Pages (ECF No. 78) and declines to permit a sur-reply as it does not need further
 11 argument from the parties to understand their positions.

12 **III. CONCLUSION**

13 **ORDER**

14 **IT IS THEREFORE ORDERED** that:

- 15 • Defendant's Motion to File First Amended Counterclaim (ECF No. 42) is
 16 **granted**. It shall file and serve the amended pleading in accordance with LR 15-
 17 1(b).
- 18 • Plaintiff's Motion to Vacate Order ECF No. 39 (ECF No. 47) is **denied**.
- 19 • Plaintiff's Motion to Compel Discovery (ECF No. 49) is **granted in part and**
 20 **denied in part**.
- 21 • Defendant's Motion to Extend (ECF No. 50) is **granted**.
- 22 • Plaintiff's Motion for Protective Order (ECF No. 62) is **denied**.
- 23 • Defendant's Motion to Compel (ECF No. 72) is **granted in part and denied in**
 24 **part**.
- 25 • Plaintiff's Motion for Leave to File Excess Pages (ECF No. 78) is **granted**.

26 **RECOMMENDATION**


27 **IT IS THEREFORE RECOMMENDED** that Plaintiff's Motion to Disqualify Counsel
 28 (ECF No. 64) be **granted in part and denied in part**. The District Judge should admonish and

1 sanction attorney Cebeci. He should revoke Cebeci's privilege to practice pro hac vice in this
2 case. The District Judge should impose conditions upon Cebeci's firm Rome & Associates and
3 order it to (1) screen Cebeci from this case going forward, and (2) certify that Cebeci has been
4 screened from this case and that he will not share in any fees going forward by filing a notice with
5 this Court regarding the screening.

6 **NOTICE**

7 This report and recommendation is submitted to the United States District Judge assigned
8 to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation
9 may file a written objection supported by points and authorities within fourteen days of being
10 served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely
11 objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d
12 1153, 1157 (9th Cir. 1991).

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14 DATED: January 14, 2021

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16 _____
17 DANIEL J. ALBRECHTS
18 UNITED STATES MAGISTRATE JUDGE
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